

KARUPPIAH MANICKAM & ORS

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v.

PERWIRA AFFIN BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR

b

RK NATHAN J

[SUIT NO: S2-22-352-1994]

9 MARCH 1998

TORT: Negligence - Wrongful/illegal foreclosure - Whether damage proved

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CIVIL PROCEDURE: Judgment - Oral decision followed by written judgment
- Whether amounting to two judgments - Effect thereof

The plaintiffs were the directors and shareholders of a company known as Hemvel Travel & Tours Sdn Bhd ('HTT'). On 27 September 1984, they obtained credit facilities in the sum of RM260,000 from the defendant to expand the business secured by a charge over their house and an assignment over a shop lot. The plaintiffs also executed personal guarantees as directors of HTT. In November 1985, while in India, they lost their travel documents and their business was suspended. This caused them to fall back on their instalment payments. The defendant filed a civil suit to recover the moneys and obtained judgments in default of appearance against the plaintiffs.

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On 1 April 1986, the plaintiffs informed the defendant of their plans to sell HTT to settle their liabilities. One Hj Saad Abdullah ('Abdullah') agreed to purchase HTT together with all its assets and liabilities and, on 23 April 1987 the 1st plaintiff duly informed the defendant and enclosed Abdullah's letter of agreement dated 21 April 1987. A sum of RM5,000 from Abdullah as part payment was set off against the balance due from HTT. The plaintiffs later resigned as directors of HTT on 14 November 1987 and were replaced by Abdullah and his wife. Notwithstanding this, the defendant proceeded to attach the house. In response, Abdullah filed a Notice by Claimant of Property Taken in Execution and the 1st plaintiff telephoned the defendant to draw its attention to the letters of 21 and 23 April 1987. On 2 November 1988, a meeting was held between the defendant's manager, Tan Kwe Hee, the 1st plaintiff and Abdullah where the defendant through Tan gave its blessings to Abdullah taking over the liabilities of the plaintiffs. On 10 November 1988, Abdullah executed a letter of guarantee and a personal guarantee for the sum of RM360,000 to secure the current and future liabilities of HTT.

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- a* Trusting that these matters had been settled, the plaintiffs left for India but upon their return on 19 August 1990 discovered that their house together with the contents, the shop lot and office items, and their two cars had all been auctioned off by the defendant. The plaintiffs had also been adjudicated bankrupts but the 1st plaintiff successfully set aside the bankruptcy notice. The
- b* plaintiffs lodged a police report and after failing to obtain any response to their enquiries from the defendant, they filed a suit based on negligence for damages for wrongful and/or illegal foreclosing and disposal of the house and shop lot and the items therein.

- c* Aside from the issue of negligence and damages, the court also considered the issue of whether by giving an oral decision on 13 October 1997, followed by a written judgment, the court had in fact given two judgments and the effect thereof.

Held:

- d* [1] The defendant by its conduct had accepted the fact that Abdullah would be liable for the said debts. In fact, after the meeting on 2 November 1988, the defendant had only been dealing with Abdullah in respect of the loan and had no longer even copied correspondence to the plaintiffs.
- e* [2] In the absence of Tan Kwe Hee's rebuttal evidence, the court had to accept the 1st plaintiff's evidence that the defendant's representative, Tan Kwe Hee, had promised him that the defendant would release the plaintiffs as guarantors and discharge the charge on the two properties once Abdullah executed the guarantee as agreed. The guarantee was in fact
- f* executed by Abdullah on 20 November 1988.
- [3] In the circumstances, the defendant had negligently and/or wrongfully foreclosed the plaintiffs' properties. However, the plaintiffs had failed to prove that they suffered damage. Therefore, the court could make no award for damages but allowed the plaintiffs half the costs of the action.
- g* [4] In the instant case, the written judgment of the court was an elaboration of the decision given on 13 October 1997. So long as the written judgment did not transgress the basis on which the earlier decision was given, and based on the reasoning of the Court of Appeal in *Dr Chin Yoon Hiap v. Ng Eu Khoon and Others and Other Appeals* [1998] 1 CLJ 533, a judge
- h* is entitled to give "an elaboration of the first judgment."

[Claim allowed with no order as to damages; half costs to the plaintiffs.]

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Cases referred to:

Dr Chin Yoon Hiap v. Ng Eu Khoon & Others & Other Appeals [1998] 1 CLJ 533
(*fol*)

Sykt Berkerjasama-sama Serbaguna Sungai Gelugor v. Majlis Perbandaran Pulau Pinang [1996] 3 CLJ 335 (*fol*)

For the plaintiffs - Melvin Selvam; M/s Jagjit Singh & Co

For the defendant - M Thomas Soosay; M/s Azman, Davidson & Co

Reported by Cindy Chan

JUDGMENT

RK Nathan J:

Facts

The 1st and 2nd plaintiffs (the plaintiffs) operated a company known as Hemvel Travel & Tours Sdn Bhd (HTT) incorporated in Malaysia on 23 September 1980. The plaintiffs were directors of HTT with the 1st plaintiff holding a majority share. In 1984 the plaintiffs applied for credit facilities from the defendant in order to expand their business. On 27 September 1984 the defendant approved credit facilities for a sum of RM260,000 to HTT upon the plaintiffs creating a charge over their house, No. 48, Jalan 48, Petaling Garden, Kepong, Kuala Lumpur (the house) and an assignment over a shop lot, No. 7-3, Tingkat 2, Jalan 1/64A, Udarama Complex, Jalan Ipoh, Kuala Lumpur (the shop lot). The plaintiffs were also required to execute a personal guarantee for the loan sum of RM260,000 as directors of HTT.

Subsequently, in November 1985 the plaintiffs went to India where they lost all their travel documents and indeed were stranded there. Consequently, the office of HTT was closed temporarily and the business suspended. As a result thereof, HTT could not keep up with the instalment payments in respect of the loan.

On 10 September 1986 the defendant herein filed a civil suit against HTT and the plaintiffs in order to recover the credit facilities which were granted to HTT. Judgment in default of appearance was obtained against the plaintiffs on different dates.

On 1 April 1986 the plaintiffs informed the defendant that they were trying to sell HTT in order to clear the liabilities of HTT. On 21 April 1987 one Hj. Saad Abdullah agreed to purchase HTT together with all its assets and liabilities. On 23 April 1987 the 1st plaintiff informed the defendant of the above agreement and enclosed the letter dated 21 April 1987 from Hj. Saad Abdullah. Hj. Saad Abdullah also duly paid RM5,000 as part payment of the

- a* purchase of HTT and the said sum which was paid into the account of HTT was duly set off and given credit for by the defendant towards the balance due from HTT. On 14 November 1987 the plaintiffs resigned from HTT and Hj. Saad Abdullah and his wife, Aishah bt. Hj. Darus, were appointed the new directors of HTT. On 15 September 1988 the defendant proceeded to attach
- b* the house. The plaintiffs were not at home when the attachment took place. On 3 October 1988 the said Hj. Saad Abdullah filed a "Notice by Claimant of Property taken in Execution" in respect of the items attached from the house. On 7 October 1988 the 1st plaintiff telephoned the defendant concerning the attachment of the house and drew its attention to the two relevant letters
- c* dated 21 April 1987 and 23 April 1987. On receipt of these letters the defendant wrote to the 1st plaintiff requesting a meeting among all three parties including Hj. Saad Abdullah. After the said meeting on 2 November 1988 Hj. Saad Abdullah agreed to execute a letter of guarantee for the sum of RM360,000 to secure the current and future liabilities of HTT which he did by letter dated 2 November 1988 and addressed to the defendant.
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- On 20 November 1988 Hj. Saad Abdullah executed a personal guarantee for the sum of RM360,000 to secure the current and future liabilities of HTT. Believing that all matters had been amicably settled the plaintiffs left for India on 9 January 1989. When they returned on 19 August 1990 to Malaysia, the
- e* plaintiffs discovered that their house together with all household items had been auctioned off by the defendant. The plaintiffs then lodged a police report on 14 September 1990. The plaintiffs also discovered that the shop lot and office items therein and their two cars were also auctioned off. The 1st plaintiff was adjudicated a bankrupt on 8 February 1991 and the 2nd plaintiff on 30
- f* January 1991. The 1st plaintiff successfully set aside the bankruptcy notice on 7 August 1992. The plaintiffs' enquiry with the defendant as to their house and shop lot was met with no response. The plaintiffs then, with the consent of the Official Assignee's office instituted these proceedings.

The Claim

- g* The plaintiffs' claim is founded on negligence in wrongfully and/or illegally foreclosing and disposing off of the plaintiffs' house and shop lot and for the items therein. Paragraph 28 of the statement of claim reads:
- h* Oleh yang demikian, plaintiff-plaintif pertama, kedua dan ketiga menuntut/ memohon:
- i) Gantirugi seperti di perenggan.
- ii) Possesi ke atas hartanah tersebut.
- i* iii) Gantirugi untuk pencerobohan.

iv) Gantirugi punitif.

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v) Gantirugi am bagi kecuaiian.

vi) Gantirugi teladan.

vii) Kos.

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viii) Apa-apa relif sebagaimana yang Mahkamah yang mulia ini difikirkan patut dan adil.

Court's Finding

Having heard the evidence and the submissions of the parties I made the following orders when I gave my oral decision on 13 October 1997:

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(1) I find that the defendant had by conduct accepted Hj. Saad Abdullah's agreement on 2 November 1988 to execute the letter of guarantee for the sum of RM360,000

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(2) In the absence of Tan Kwe Hee's rebuttal evidence, I accept the 1st plaintiff's evidence that the defendant's representative Mr. Tan Kwe Hee had promised him that the defendant would release the plaintiffs as guarantors and discharge the charge on the two properties once Hj. Saad Abdullah executed the guarantee as agreed.

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(3) The guarantee was in fact executed by Hj. Saad Abdullah on 20 November 1988.

(4) I also find as a fact that after the meeting on 2 November 1988 the defendant only wrote to Hj. Saad Abdullah concerning the loan to HTT. No correspondence or copies went to the plaintiffs (PW1 admitted this in cross-examination).

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(5) Even when foreclosing the said two properties defendant (DW1) admitted in cross-examination that no notice sent to plaintiffs.

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(6) I find that the defendant had negligently and/or wrongfully foreclosed the 1st and 2nd plaintiffs' two properties at no. 48 Jalan 48, Petaling Garden, Kepong, Kuala Lumpur and at No. 7-3 Tingkat 2, Jalan 1/64A Udarama Complex, Jalan Ipoh, Kuala Lumpur

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(7) However I find that the plaintiffs have failed to prove damages.

(8) I therefore make no award for damages and allow the 1st and 2nd plaintiffs half the costs of this action.

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- a* (9) The prayers for damages (except for para 28(v) and (vii)) are unheard of and amount to bad pleadings.

Since both parties have filed notices of appeal I now proceed to give my grounds for making the above decision.

- b* Whilst it is obvious that the charge documents remain executed by the plaintiffs, I find that the defendant had by its conduct accepted the fact that Hj. Saad Abdullah would be liable for the debts. In fact in line with its conduct the defendant had only been dealing with Hj. Saad Abdullah in respect of the loan and had no longer even copied correspondence to the plaintiffs. I
- c* find as a fact that after the meeting on 2 November 1988 the defendant only wrote to Hj. Saad Abdullah concerning the loan to HTT, and as admitted by Koh Teck Lee, the bank officer who testified for the defendant, even when foreclosing the two properties, no notice was sent to the plaintiffs. In fact the letter from the defendant to the said Saad bin Abdullah dated 10 January 1989 is self-explanatory. The letter reads:
- d*

We write with reference to your letter dated 2.11.88 and the telephone conversation with your goodself, requesting you to call upon us to have further discussion due to the non-payment of the sum of \$6,000 as promised being arrears for the months of November '88 and December '88 in respect of the above accounts.

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In view of the fact that, you have failed to respond to our telephone calls, we hereby give you another seven (7) days' notice from the date hereof, to forward the sum of \$6,000.00, failing which we have no other alternative but to continue legal action against the borrower and enforce legal action against you under the guarantee executed in our favour.

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Please view the above very seriously.

Your cooperation is highly appreciated.

- g* The subsequent demand notice from the defendant's solicitors dated 16 April 1989 speaks volumes. The said letter reads as follows:

We act for M/s. Perwira Habib Bank (M) Berhad of Ground Floor, Wisma SPK, Jalan Sultan Ismail, 50250 Kuala Lumpur.

- h* We are instructed that by a Letter of Guarantee in writing dated 20th November, 1988, you guaranteed the payment of all outstanding sums in M/s. Hemvel Travel & Tours Sdn. Bhd.'s account with our client in respect of the above set out facilities.

- i* The said Hemvel Travel & Tours Sdn. Bhd. has failed to settle all outstanding sums. As at 31st December, 1988, the total sum of \$375,354.97 is outstanding and due from you as guarantor as follows:-

FACILITY	OUTSTANDING AS AT 31.12.88	a
TERM LOAN	\$119,816.72	
OVERDRAFT	<u>\$255,538.25</u>	
	\$375,354.97	
	=====	b

We are now instructed to give notice to you which we hereby do THAT UNLESS you do WITHIN SEVEN (7) DAYS from date hereof pay us as Solicitors the said sum of \$375,354.97, interests and costs of this notice, our firm instructions are to file legal proceedings against you as guarantor to recover same, additional costs and legal charges without further reference to you. c

I hold that the defendant is estopped from claiming that the plaintiffs' liabilities have not been discharged and that the properties have not been released as securities. Whilst they may not have been formally discharged as securities I find that they have been so discharged. In fact by letter dated 2 November 1988 Hj. Saad Abdullah met with Tan Kwe Hee and the 1st plaintiff and agreed, with the blessings of the defendant, to take over the plaintiffs' liabilities and to also execute a fresh letter of guarantee for RM360,000. In addition the deposit of RM5,000 paid by Hj. Saad Abdullah towards the purchase of HTT had also been credited to the account of HTT. d e

In fact the Manager of the defendant, Tan Kwe Hee, had written to the 1st plaintiff on 14 October 1988 to attend his office with Hj. Saad Abdullah on the takeover of the plaintiffs' liabilities. Under cross-examination the 1st plaintiff said that when he attended the Bank with Hj. Saad Abdullah on 2 November 1988 and that whilst Hj. Saad Abdullah signed the fresh guarantee in replacement of the guarantees signed by the plaintiffs the defendant through the said Tan Kwe Hee, had promised to discharge the properties and on this promise and trusting the defendant, both he and his wife left for India on 9 January 1989 with the defendant dealing thereafter directly with Hj. Saad Abdullah. f g

In spite of PW1's evidence that it was the Manager, Tan Kwe Hee, who made the promise on behalf of the defendant, the said Tan Kwe Hee was not called nor any explanation given as to why he was not called. In the circumstances I accept the 1st plaintiff's evidence that the defendant through the said Tan Kwe Hee had promised the plaintiffs that it would release the plaintiffs as guarantors and discharge the charge on the two properties once Hj. Saad Abdullah had executed the guarantee, which he did on 20 November 1998. h

In the circumstances, it is my finding that the defendant had negligently and/or wrongfully foreclosed the 1st and 2nd plaintiffs' two properties. i

a Plaintiffs Have Not Proved Damages

Having found for the 1st and 2nd plaintiffs, I have to see if they have established the losses claimed.

Special Damages**b**

The plaintiffs claimed the following in special damages:

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|----------|---|--------------|
| | (i) Kerugian kereta BAL 3968 | RM9,000.00 |
| | (ii) Kerugian kereta PAM 5727 | RM32,000.00 |
| c | (iii) Kerugian barang-barang rumah | RM90,000.00 |
| | (iv) Dengan salah merampas menjual premis No. 48 Jalan 48 Petaling Garden, Kepong, Kuala Lumpur | RM200,000.00 |
| d | (v) Dengan salah merampas menjual premis pejabat No. 7-3 Tingkat 2, Jalan 1/64A, Kompleks Udarama, Off Jalan Ipoh, Kuala Lumpur | RM300,000.00 |
| e | (vi) Kerugian pecahsempadan pejabat, penghawa dingin, perabot dan apa-apa yang wajar | RM80,000.00 |
| f | (vii) Kerugian fail-fail perniagaan | RM100,000.00 |
| | (viii) Kerugian penyewaan | akan dinilai |

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It is a sad state of affairs that no evidence was led to prove any of these items claimed. With regard to the claim regarding the said two cars, namely, items (i) and (ii), no evidence was led as to ownership of the cars, let alone their values. In respect of item (iii) being the claim for goods lost from the house amounting to RM90,000 neither were the goods identified and itemised nor were their values proved. In respect of items (iv) and (v) no valuation reports as to the worth of the two properties were tendered. Item (vi) was not identified nor their worth proven. In respect of item (vii) other than proving that he was doing tax management services for various clients, the 1st plaintiff did not even lead evidence regarding the clients whose files he had placed the worth at RM100,000. He made no satisfactory attempts to call any of the clients, nor show to the satisfaction of the court why those files could not

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have been reconstructed nor the cost of such reconstruction. In any case he admitted putting an estimated figure of RM100,000. As for item (viii) being the loss of rental no evidence was led. To a question by the court as to whether he was abandoning the claim for rentals the 1st plaintiff informed the court that he was not. Yet nothing came out of this.

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The plaintiffs must know that they cannot seek damages from the court without proving them. This is trite law. I am satisfied that whilst labelling the above as special or quantified damages the plaintiffs have however failed to prove any of the items claimed.

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As for para. 28(i) to (viii) of the statement of claim I have held that the prayers as pleaded (except for item (v) being a claim for general damages for negligence) are unheard of and amounts to bad pleadings. In any case no evidence has been led.

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As for item (v) being a claim for damages in negligence the claim is more in line with a claim for special damages which I have considered and dismissed for want of proof. There was no evidence led that the plaintiffs were mentally or emotionally affected by the defendant's negligence. There was no medical reports nor did the plaintiffs themselves offer any evidence to support a claim for general damages. This prayer too fails for lack of proof. Since the 1st and 2nd plaintiffs had succeeded on the issue of liability but failed to prove damages I felt it appropriate to only award the 1st and 2nd plaintiffs half the taxed costs of this action.

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The 3rd plaintiff had discontinued this suit with costs which I assessed at the outset at RM3,000 to be paid to the defendant.

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There is one final issue which I have to consider. The question might arise as to whether I have, by giving an oral decision on 13 October 1997 and subsequently this judgment, in fact given two judgments. In *Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor v. Majlis Perbandaran Pulau Pinang* [1996] 3 CLJ 335 the Court of Appeal held that it is undesirable to have two written judgments in the same case as any supplementary grounds after a written judgment has been delivered may well affect judicial credibility because they could easily be mistaken for the wisdom of hindsight rather than representing the actual decision-making process. However, the Court of Appeal very correctly held that this finding that there are two written judgments, should not cause any injustice to the parties, since the appeal itself was by way of a rehearing and the court must tackle afresh all the issues raised in the court below including those the judge did not deal with. In another recent judgment, namely *Dr. Chin Yoon Hiap v. Ng Eu Khoon and Others and Other Appeals* [1998] 1 CLJ 533 the Court of Appeal again adopted its earlier decision, notwithstanding the fact that, as said by Abdul Malek Ahmad JCA at p. 545:

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- a* The situation in the present appeal are quite different from that of *Syarikat Berkerjasama-Sama* case. Here, the learned trial judge had dealt with the same issues differently in her two judgments ...

In the circumstances, the Court of Appeal went on to hold:

- b* ... that her second judgment is a nullity despite being conscious of the fact that since this is by way of rehearing, it was open to us to deal with all the issues afresh which we did but then our findings coincided with her first judgment.

- c* What is therefore important is that even if there are two judgments the Court of Appeal will deal with “all the issues afresh” and then come to a finding. However Abdul Malek Ahmad JCA went on to say at p. 546:

- d* Based on these considerations, we came to the conclusion that only the first judgment can be considered especially since we have no inkling as to why there were two separate judgments eight months apart and **because the contents of the second judgment are not exactly an elaboration of the first judgment** resulting in the fact that they actually do not tally in substance. (emphasis added)

- e* It is on this rider that I state that in the instant case my judgment today is an elaboration of the decision given on 13 October 1997. Surely parties want to know why they won or lost a case on the day the decision is given. So long as the written judgment does not transgress the basis on which the earlier decision was given and based on the reasoning of the Court of Appeal in *Dr. Chin Yoon Hiap*, a judge is entitled to give “an elaboration of the first judgment”. In this case that is precisely what I have done.

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